

## Central Law Journal.

ST. LOUIS, MO., NOVEMBER 19, 1915.

### REPORTING INCIVILITY OF EMPLOYEE OF PUBLIC SERVICE COMPANY AS PRIV- ILEGED COMMUNICATION.

There is reported a decision by California Third District Court of Appeal and its affirmance, in a qualified way, by California Supreme Court, that takes account of a new element in the rule of privileged communication under the law of libel and slander. *Adams v. Cameron*, 150 Pac., 1005; *Same v. Same*, 151 Pac. 286.

It appears that plaintiff had been a conductor on a railroad train and that defendant reported to the general manager of the railroad that he used, on a certain day, rough language to a well dressed passenger and that he seemed to be under the influence of liquor. On two former occasions plaintiff was stated to have been guilty of coarse deportment to passengers, and each occasion was apparently under the influence of liquor. The wish was expressed that he merely be cautioned against drink in working hours and it was stated that this report was in the interest of employee, employer and the public, and the writer had no objection that the charge be shown to the plaintiff.

Plaintiff was discharged and sued the defendant averring that the charge was false and he was unable to secure re-employment. He obtained a verdict which was sustained in both of the above named courts. Defendant in his pleas averred the truth of the charges, that he made them at the posted requests of the employer and that he believed them to be true. The trial court injected into requests by defendant "a qualification to the effect that before libelous matter can be privileged it must appear that it was and is substantially true." The Supreme Court objects to this qualification

but considers the error immaterial in view of the express finding by the jury that defendant was actuated by actual malice.

It is hard to conceive that such a qualification could be regarded as harmless error, even in the face of special findings by a jury that there was actual malice and that the report was not made in good faith and in the honest belief of its truth.

A conclusion by a jury is a composite as greatly of the manner in which a case is tried as by the real facts entering into that conclusion. As in this case the court tells the jury that though a communication be privileged, no mistake about the facts, however honestly made, will excuse the exercise of the privilege. That being so there can be no question of honest or dishonest conduct in reporting a fact, but the jury was bound to answer as to good faith in making the report at the request of the employer. When they found the report to be false there was an end of the matter.

Independently, however, of this report being privileged, if believed to be true, there was an implied agreement by the employees of the railroad, that honest belief regarding their misconduct should be reported to their employer. The evidence shows that there were posted in the cars that plaintiff, as conductor, was in charge of, requests that incivility by employees be reported. May an employee take and continue in employment of this kind and then complain that one, who is endeavored in this way to be protected, complains if he honestly believes that the protection is denied him, and states the particulars of his belief?

We have read decisions holding railroads to severe responsibility for insults to passengers on trains, and even for coarse language addressed to other passengers in their hearing. These common carriers have been held to be responsible for malicious torts by employees in this regard. And this is on the theory that not only security, but comfort and respect are due by these

public agencies. If all of this is so very important, a passenger may reasonably apprehend that, if one passenger is treated unduly and coarsely, his own feeling of security and comfort is threatened. This is especially true as to this case because the conductor seemed to defendant to be under the influence of liquor. Plaintiff admitted he had taken a drink for a cold and he does not deny that fumes of liquor may have been on his breath. Such a conductor ought not to be deemed a proper representative of a railroad—especially so far as women passengers are concerned.

But the immediate question here is whether the qualification held by the Supreme Court to have been erroneous was cured by the special findings, and it seems to us, that the Supreme Court stretched the principle of harmless error to an undue extent. Defendant planted his defense principally upon the report being a privileged communication, and this theory was emasculated.

#### NOTES OF IMPORTANT DECISIONS.

**HOMESTEAD—STATUTORY CONSTRUCTION ELIMINATING LIMITATION OF VALUE.**—Ninth Circuit Court of Appeals indulges in a method of construction, which defeats the limit of value fixed by law for a homestead exempt from sale in an effort to preserve the minimum of quantity, "regardless of value," and in the case before the court exempts to a homesteader a homestead of the value of \$12,000, when the statute of Oregon says it "shall not exceed \$1,500." *In re Bode*, 225 Fed. 715.

This statute states the maximum value to be \$1,500 and the quantity to be 160 acres in country, or one block in a town or city, "but in no instance shall such homestead be reduced to less than twenty acres or one lot, regardless of value."

The following section provides that when a homestead is levied on and defendant claims it as such, then, if it exceeds \$1,500, three freeholders may appraise it, and the sheriff sell down to the smallest subdivision that is worth \$1,500. Or, in lieu of this, the creditor may pay the debtor \$1,500 and sell the homestead, adding the \$1,500 to his lien.

The court construes this to mean that the creditor only has the right to make such payment where the debtor holds in excess of twenty acres in country or one lot in a city. But why this construction it is difficult to see. The \$1,500 may be tendered under some conditions, and when it is tendered and paid, the money takes the place of all homestead right in all land claimed. It is equally as hard on a debtor to be deprived of twenty acres or one lot worth more than \$1,500, where he claims in quantity more than that, as where he confines his claim to such quantity. If appraisers cannot reduce his holdings claimed to be exempt below twenty acres or one lot, as the case may be, still there is no limitation placed by statute on the right of a creditor to pay the debtor the full value in money which is to stand for his homestead, and sell the homestead he claims to be exempt. The statute says the money paid "shall be exempt from execution," because it has been paid to the debtor for his homestead interest. In this way the statute would work uniformly; otherwise, not.

**CRIMINAL LAW — LIVING TOGETHER AS HUSBAND AND WIFE AS MAKING BIGAMY IN SUBSEQUENT MARRIAGE.**—*Nye v. State*, 178 S. W. 100, decided by Texas Court of Criminal Appeals, in which there was a dissenting opinion, shows an appeal from a conviction for fornication. This conviction was affirmed and defendant is to be admired for his nerve in having appealed from it.

The facts show that former cohabitation with the woman, with whom the offense of fornication was alleged, continued for four years, both agreeing to hold themselves out to the world as husband and wife, but the woman not really considering herself as married. In every way that it was possible for the world to regard the couple as man and wife the situation was maintained, but the majority stresses the fact that a ceremonial marriage was expected by the woman at some time or other.

The dissent took the position that the holding themselves out to the world upon the agreement to carry out before others the contract between them as man and wife constituted a good common law marriage, howsoever each one may have deprecated such a relation as being inferior to a ceremonial marriage.

It seems to us that the dissent takes the proper view. The origin of a common law marriage as being, so to speak, meretricious ought not to militate against its being a valid common law marriage, the parties being able to contract such a marriage, the protection of offspring as legitimate being necessary that

this should be so. People ought not to be allowed to blow hot and cold accordingly as they might wish to recognize or disavow the relationship of marriage. Mere preference of one sort of ceremony over the other or even that one of them should think the kind of marriage, in which they hold themselves out to the world, is immoral, should be deemed no bar to its legality.

The majority opinion speaks of intent of the parties being sustained and instances the ceremonial marriage as material on this question. We think, however, that the commission of what would be a crime, if all the facts showed a sufficient holding out before that to constitute a common law marriage, was very weak, not to say wholly immaterial, as evidence.

**TORT — LIABILITY PREDICATED ON MALICE IN THE DOING OF AN UNNECESSARY ACT.**—The case of *Keeble v. Hickeringill*, 11 East. 574, decided in the reign of Queen Anne, which held in effect that one maliciously interfering with and with no purpose of deriving advantage from the pursuit of a business equally open to him as to another, commits an actionable injury, is harked back to in a recent decision by Supreme Court of Tennessee. *Hutton v. Watters*, 179 S. W. 134.

The facts in this case show a petition charging that defendant maliciously interfered with the boarding house business of plaintiff and practically destroyed it, not by setting up a business in competition therewith or to protect any interest of his own. The petition was demurred to in the trial court, and upon the demurrer being sustained, appeal was taken to Tennessee Court of Civil Appeals, which court reversed the ruling of the trial court. This latter decision the Supreme Court sustains.

The Supreme Court says: "It is wholly impossible to formulate a description which will cover all acts which are intentionally hurtful to another and at the same time justifiable in law," but: "It is left in each case for the court or the court and jury, according to the way in which the controversy is presented, to say whether the defendant's conduct complained of was, in view of all the circumstances, a reasonable and proper exercise of his right of self-protection or self-advancement, both as to the substance of it and the method of it."

This exceedingly lax rule will in many cases come quite nearly to effacing defenses, where it is plain that the doing of an act complained of has its sole or principal reason in the malice of an actor. There ought to be a presumption in favor of defendant, when an act, though

maliciously done, has or may be construed to have some relation to his interest, or in some way be deemed for his protection. The burden ought to be on plaintiff to show clearly, that reasonably, at least, an act done maliciously had no tendency, direct or indirect, to benefit defendant.

The opinion in this case cites a great many cases apparently supporting its conclusion and excerpts from some of them stress the wrongfulness of acts more than the entire absence of possible beneficial results to the actor, and perhaps it is not a bad rule to declare that reasonable protection ought not to be thought to issue out of the doing of acts inspired principally by malice—especially if the doing of them seems grossly unfair. One of the most noted cases in American jurisprudence on this subject is *Dunshee v. Standard Oil Co.*, 152 Iowa 623, 132 N. W. 371, 36 L. R. A. (N. S.) 263. In the acts of the defendant there protection of its interests was not wholly unapparent.

## A TRADITION THAT PRODUCED GREAT JURISTS.

Whoever would write of the history of philosophy must deal with philosophers. Dominant intellectual movements, the trend of thought of particular periods, are incomprehensible apart from the personality of those who initiate them. In the same way the biographical interest properly occupies a large place in the history of law. In treating legal history it is not sufficient to deal with the growth of particular institutions, but the great importance of the personal factor must be recognized. For this reason books like "Great Jurists of the World" (Vol. 2, of Continental History Series, published by Little, Brown & Co., already reviewed in these pages Vol. 79, p. 140), do more than to provide entertaining biographies; on the contrary, the biographical method has a legitimate function which in future deserves to be widely extended.

In England and the United States the individual judge has had a far more important part in shaping the law than the Continental magistrate, yet a few great

lives, such as those of Coke, Blackstone, Mansfield, and Stowell, or of Story, Marshall, Kent and Field, have left a permanent impress upon the law. The value of so instructive a work as Carson's "History of the Supreme Court of the United States," comes in no small degree from the fact that it is largely a biographical document.

On the Continent the personal factor has for several reasons been more important. Our own law has been a self-perpetuating system. It has flowed on in the steady stream of judicial precedent, overcoming obstacles by the teamwork of the judges, rather than by isolated effort of an individual. Such unity and coherence as our law has acquired are more the product of a complicated process of judicial exegesis, in which many minds have co-operated, than of the activity of a master mind. On the Continent, on the other hand, there have been periods of unification and consolidation when the task of bringing order out of a diversified mass of local customs fell largely to the lot of a single mind, such as that of a Bartolus, a Cujas, or a Pothier. In these periods of consolidation or codification the work largely devolved on one man, who showed himself possessed of a special faculty for systemization. If the same code-building faculty existed in England it did not find the same opportunity there for its exercise. Jurists, like Bacon and Stowell, could not possibly influence the development of law as Pufendorf and Vattel did.

The systematic jurist has owed no small part of his training to the influence of the great body of Roman law. In periods of ferment and uncertainty, he has been able to devote himself with all his strength to the task of conserving and consolidating the great Roman law tradition of an orderly, unified jurisprudence. In times of quiescence under an established code regime he has found a field for

the same faculty, as he does to-day when he writes commentaries on particular subdivisions of the code. In England this synthetic grasp of legal principle has been most in evidence in jurists whose minds have come under the influence of Roman law, as in the case of Bacon and Austin.

In the exploration of the uncharted sea of international law the systematic jurist has also found an inviting field for his efforts. No doubt the Roman law tradition influenced Grotius and Vattel and helped to evolve an orderly systematic exposition of international law which would have been impossible where this tradition was weak, as in England.

This all goes to show the importance of the study of Roman law in the formation of the systematic legal mind. The powerful force which the Roman law tradition has exerted for unity and consistency in legal doctrine cannot be paralleled by any similar force exerted in common law countries in our own day, by social causes which are slowly effecting a partial unification of law, as in the field of commercial transactions. Our uniform acts will not go far toward training systematic jurists worthy to take rank with those which periods of consolidation on the European Continent have brought forth.

In a volume written for a series dealing with Continental legal history it is proper that England should be allotted a subordinate place if not altogether excluded. In the light of the foregoing considerations another justification, however, may be perceived for giving England scant attention. The legal mind, in its fullest logical development, has been chiefly a product of the Continent. For a philosophical grasp of legal principle, for unity and synthesis, the legal mind in England and America must look to the Continent for inspiration and guidance. The synthetic tradition of Continental jurisprudence alone provides that remedy for the decentralizing tendencies

of Anglo-Saxon law which is needed to correct a too piecemeal treatment of the law, and to help the legal mind toward the complete realization of its powers.

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# CAN CONGRESS LEGISLATE AGAINST TRESPASSING UPON TRAINS, TRACKS AND RIGHTS-OF-WAY OF INTERSTATE RAILROADS?

The elimination of trespassing is of vital importance to railroads and to humanity. The enormous cost to railroads and the devastating result to human kind from injuries to trespassers is appalling. For the fiscal year ending June 30, 1915, there were killed on the Southern Railway lines 147 trespassers, and 273 others were seriously injured. During the calendar year 1914 there were injured on the railroads in the United States 10,785 trespassers, of whom 4,746 were killed, 826 lost one limb, 172 lost two limbs, and 5,041 were seriously injured.

Further analyzing these figures, 4,712 were injured while walking on tracks, 3,840 while riding on trains, 1,511 in various other ways, and 722 unknown; 10,224 were males and 561 females; 2,359 were married, 4,618 were single, and 3,808 unknown; 484 were between the ages of 5 and 15, 2,173 were between 15 and 21, 6,485 were between 30 and 50, 1,190 were 50 years of age and over, and 453 unknown; 7,282 were Americans, 2,086 foreigners, and 1,417 unknown. By occupation, 3,675 were unskilled laborers, 1,160 were skilled laborers, 159 professional, 99 merchants, 134 clerical, 281 housewives, 1,846 had no occupation, and 3,431 were unknown. The number has grown by rapid leaps from year to year. Then, being confronted by these figures, why wonder that thinking

men should wish to devise means to lessen the evils resulting therefrom?

State laws have largely proven ineffective, and many think that congressional legislation is the only means to conserve this valuable human asset and to eliminate one of the great burdens to commerce. Has Congress the power to legislate upon this important subject?

Wherever Congress possesses authority under the Interstate Commerce clause of the Constitution of the United States, the power is complete. We have only to go back to the definition given by Mr. Chief Justice Marshall in the case of *Gibbons v. Ogden*, 9 Wheaton, as a basis for this statement. To use his language, often quoted:

"This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution."

This principle of law has been steadfastly adhered to, and, in a case as late as 1912, Mr. Justice Hughes said:

"The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations."<sup>1</sup>

The power of Congress to regulate interstate commerce according to its will, subject alone to the limitations of the Federal Constitution, is unquestionable; but the power to regulate does not stop with commerce itself, but extends to all incidental and collateral matters which have a real and substantial relation to such commerce, and thus the instrumentalities of interstate commerce, the persons who conduct it, have in turn passed under the regulatory power of Congress.

Nor is Congress restricted with respect to the method and form of regulation other than by the inhibitions of the Federal Con-

(1) 230 U. S. 399.

stitution; nor is its power confined to mere general regulations.

"It is not doubted that Congress has the power to go beyond the general regulations of commerce which it is accustomed to establish and to descend to the most minute direction if it shall be deemed advisable."<sup>2</sup>

The Supreme Court of the United States, when applying the Safety Appliance Act to intrastate traffic when moving on a railway which is a highway of interstate commerce, held, in *Southern Railway v. United States*, 222 U. S., at page 73, that if there was a real or substantial relation or connection between what is required by the Safety Appliance Acts in respect to vehicles used in moving intrastate traffic and the safety of interstate commerce, and of those who are employed in its movement, then such acts apply to such intrastate movements. "And this is so," said Mr. Justice Van Devanter, "not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it."

Congress, too, in the sphere of its regulation of interstate commerce, can exercise within the limits of the subject, the police power and may establish police regulations, as well as the states.<sup>3</sup>

I think, therefore, it is safe to say that Congress, by appropriate legislation, can regulate not only interstate commerce proper and its immediate incidents, but that it has also control of such other matters as may have relation to and substantial bearing upon interstate commerce. This leads to the proposition that the power of regula-

tion can be used by Congress in respect to those matters and things which aid interstate commerce and also to those matters and things which hinder or burden it; or, in other words, to all the coincidents of interstate commerce.

Mr. Justice Van Devanter, in the 2d Employers' Liability Cases, 223 U. S., pages 1 and 49, quotes with approval from a brief prepared by a former Solicitor General of the United States as follows:

"Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which in the exercise by itself of a fair discretion may be deemed appropriate to save the act of interstate commerce *from prevention or interruption, or to make that act more secure, more reliable or more efficient.*"

The Justice then proceeds with the argument apposite to the particular case with a view of showing that the act of employees engaged in interstate commerce furthers and aids that commerce, and, by direct step, to the further proposition that if the agents or instruments of commerce are disturbed while doing the act, the commerce itself is hindered.

I think that the language of the Attorney General above italicized states a true principle and one which extends to the present question which we are considering. The tracks and rights of way of a railroad engaged in interstate commerce are instrumentalities of that commerce, and any interference with these instrumentalities necessarily affects the conduct of interstate commerce itself.

Over the entire Southern Railway Company, at multitudinous points, in yards, out on the line, away from crossing and between crossings, there exists a practice upon the part of pedestrians to trespass at will and to an enormous extent. This practice subjects sometimes the track of the railway company for miles to the use of pedestrians as a passageway. As has been seen, 4,712 were struck on railroad tracks

(2) Cooley's Constitutional Limitations, 7th edition, page 856, citing *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 215.

(3) Cooley's Constitutional Limitations, same page.

in the United States during the year 1914, while doubtless thousands and hundreds of thousands escaped. It constitutes a menace to life and limb. Interstate commerce is facilitated by safe operation of trains and it is impeded by operation which creates dangers to human beings, and it should also be considered that whenever a trespasser upon a track is in danger, the train may also be in danger. The habit of trespassing upon the tracks and rights of way of a railroad company, therefore, has a relation to interstate commerce, having an impeding effect thereupon by reason of the fact that at points where the company requires, for speedy, safe, and expeditious operation of trains, the exclusive use of its tracks and rights of way, it must share the same with members of the public who trespass upon its rights of way for their own convenience, the use by the public and by the company be inconsistent and to the disadvantage of the company.

In its final analysis, we are called upon to share the ways and instrumentalities of interstate commerce with wrongdoers, to the hurt and hindering of such commerce, since whenever a way of interstate commerce is impeded and an instrumentality thereof impaired, the commerce itself must suffer in consequence.

Besides, as is well known, in order to meet the situation incident to the growing habit on the part of the public to trespass upon the grounds, tracks, and rights of way of the company everywhere, there have grown up by virtue of the decisions of most, if not all, of the states in which this company operates, burdensome duties upon those in charge of the operation of our trains with respect to speed and watchfulness, which not only distract and confuse the human agents in charge of the trains, rendering them less efficient, but also impede the progress of the trains themselves.

In other words, considering the extent of trespassing upon the rights of way and tracks of Southern Railway Company, if the trains of the company have to be run

under the rules of care laid down in the cases, our trains carrying interstate commerce would be delayed to an appreciable extent.

Of course, it might be urged that this aspect of the matter presents a judicial question, and that it is permissible for us to demonstrate in the courts the burden upon interstate commerce which the duties to trespassers may involve, as the reason why the duties in question should not be judicially declared; but this is no reason why the legislative branch of the federal government should not deal with the subject.

Indeed, we all know that in an isolated case by a trespasser it would be well-nigh impossible to invoke his single particular act as a burden upon interstate commerce, so as to justify our disregard of precautions with respect to him, even if it were otherwise practicable to urge this character of defense. The Supreme Court of the United States in the *Debbs* case, 158 U. S., pages 564, 582, and 583, very clearly demonstrated the right to resort to the judicial powers of the federal government, even though the same ends might be obtained by the activity of the executive branch.

The *Debbs* case is also high authority for the power in the federal government (and this must include the legislative branch thereof) to protect interstate commerce from the wrongful acts of those who would interfere with, stop, or destroy it. In the opinion, on page 586, the late Mr. Justice Brewer uses this language:

"The national government, given by the constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore with the duty of keeping *those highways of interstate commerce free from obstruction*, for it has always been recognized as one of the powers and duties of the government *to remove obstructions from highways under its control.*"

Congress not only has the power by legislative acts to promote interstate commerce, but it has also the power to aid it by prohibitions. Indeed, there are many analogies, such as the lottery acts, the act preventing the exportation of diseased cattle, of game killed in violation of the state laws, the white slave act, and many others, where Congress under its authority over interstate commerce has enacted prohibitions directed against third persons or members of the public.

Although the regulations of Congress, as a rule, have been directed against the persons and corporations directly conducting interstate commerce and immediately engaged therein, there is ample precedent for the extension of its regulations so as to embrace those who come within the range of the operation of the agencies of interstate commerce. Congress, according to the *Carlin* law, has the power to protect interstate commerce from the acts of outside depredators. If this is true, surely it also has the power to protect the instrumentalities of interstate commerce from the impediment of the evils, the burdens, menaces, and hindrances which trespassing creates.

In the opinion of the majority of the court in the lottery cases, 188 U. S., 354 and 355, it is very strikingly pointed out that the general terms in which the delegation to Congress of the power to regulate commerce is made leaves the legislative branch of the national government, in the absence of the fixing of specific regulations by the constitution, free to regulate according to the growing needs and developments of interstate commerce. Mr. Justice Harlan says:

"It is to be remarked that the constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In *Gibbons v. Ogden* it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed, but this general observation leaves it to be determined when the question comes before the court whether

Congress in prescribing the particular rule has exceeded its power under the constitution. While our government must be acknowledged by all to be one of enumerated powers (*McCulloch v. Maryland*, 4 Wheaton, 316, 405, 407), the constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means which may be employed in executing a given power. The sound construction of the constitution, this court has said, 'must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'"<sup>4</sup>

When it is considered that the cardinal doctrine has been established by the decisions of the Supreme Court of the United States that interstate commerce must be free and unfettered, and that laws and regulations, even of the sovereign states themselves, have been declared invalid when found to unduly burden the commerce between the states, can it be doubted that Congress possesses the power to free the ways and routes of interstate roads from the obstructions placed thereupon by trespassing?

I have presented these views, which tend to the conclusion that Congress can prevent trespassing upon the tracks, grounds, and rights of way of interstate railroads by legislation: (a) because such trespassing impairs substantially the efficiency of instrumentalities of interstate commerce—indeed, in a sense trespassing is a wrongful appropriation of the ways, means, and instrumen-

(4) 4 Wheaton 421.

talities of interstate commerce; (b) because such trespassing inevitably impedes the operation of trains and constitutes a menace to the safety of the trespassers, as well as to that of the trains.

So far as the stealing of rides or, to use the common term, "hoboing," upon interstate trains is concerned, I think there can be but little doubt but that Congress has the power to deal with this phase of trespassing.<sup>5</sup> The practice is dangerous and threatens life and limb, and a consideration of safety in the conduct of interstate commerce would bring this character of trespassing within the purview of congressional action. Besides, transportation, though in the abstract sense invisible, is a valuable commodity, and Congress would seem to have the power to prevent the theft of interstate transportation. Further, the practice of stealing rides upon interstate trains, or "hoboing," is resorted to, to a large extent, by criminals and undesirable classes, and Congress can prevent the routes of interstate commerce from being used by such persons.

A large number of the states, under their police power, have passed laws making it a crime for a person to secrete himself upon a train for the purpose of stealing a ride, and kindred laws. If the state has this power with respect to transportation, why cannot Congress, which is supreme within the sphere of interstate commerce and which within this sphere has full police power, also make the stealing of a ride a criminal offense? As Mr. Chief Justice Marshall further said in the case of *Gibbons v. Ogden*:

"If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in Congress *as absolutely as it would be in a single government* having in its constitution the same restrictions on the exer-

cise of the power as are found in the Constitution of the United States."

Under the rate-making power and the power to prevent discrimination, might not Congress also possess as an incident the power to pass legislation to prevent the stealing of rides? Besides, if Congress can prevent the giving of free passes, why can it not forbid the theft of carriage?

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#### SALES—PARTIAL ACCEPTANCE.

STEARNS SALT & LUMBER CO. v. DENNIS LUMBER CO.

154 N. W. 91.

Supreme Court of Michigan. Sept. 28, 1915.

Where a firm ordered lumber, immediately upon receipt notifying the seller that part was defective, the acceptance of the standard portion of the lumber did not preclude the buyer from rejecting the remainder, and subjecting it to liability therefor, as the contract was separable.

KUHN, J. On December 29, 1911, the defendant company placed an order with the plaintiff company by telephone for two carloads of a certain grade of lumber, and followed this by letter confirming the same, which read as follows:

"Dennis Lumber Company.

"Grand Rapids, Mich., 12-29-11.

"Stearns Salt & Lumber Company, Ludington, Mich.—Gentlemen: Confirming conversation over the phone the other evening with Mr. Holland, at which time he booked our order for the two more cars of 4 in. No. 4 pine crating strips D2S to  $\frac{3}{4}$  in., to be same quality as the last shipped us, we wish to inquire as to how soon you will be able to make shipment of these two cars.

"Awaiting your reply, we are,

"Yours very truly,

"Dennis Lumber Company."

To this communication the plaintiff company replied under date of December 30, 1911, advising that the lumber would be shipped at once.

On January 6, 1912, the plaintiff mailed to the defendant an invoice of the first car of

(5) *Smith v. Industrial Coms.*, 147 Pac. (Cal.) 600.

lumber shipped, and on January 11, 1912, sent an invoice of the second car-load shipped. The first car of lumber was placed for unloading February 19, 1912, and was unloaded on the following day. The other car was placed for unloading on February 21, 1912, and the unloading of that car was completed within two days, on February 23rd. On the next day, February 24, 1912, defendant notified plaintiff of the rejection of part of the lumber received, by the following communication:

"Dennis Lumber Company.

"Grand Rapids, Mich., Feb. 24, 1912.

"Stearns Salt & Lumber Co., Ludington, Michigan—Gentlemen: We herewith hand you report on the two cars of pine crating as follows:

B. & M. 61015.....27,106 ft. of good  
1,479 ft. of worthless culls

28,585 ft. total which shows

—a shortage of 32 ft.

O. C. L. 9114.....25,540 ft. of good  
2,395 ft of worthless culls

27,935 ft. total.

"The writer has looked these culls over very carefully, and there is no doubt but that our customer has been more than fair in what he has taken. However, if you wish, we will have Mr. Tillitson go over the culls, or if your Mr. Holland can spare the time to go with us to look them over the next time he is down here, it will save any unnecessary expense in the matter.

"We are certainly surprised that any inspector could or would attempt to ship any such strips for No. 4, as they are so poor and rotten that they will hardly hold together and are absolutely of no value whatever.

"We herewith enclose statement and our check to balance account for these two cars.

"Yours very truly, Dennis Lumber Co."

The plaintiff company immediately replied that it would not consent to any loss on the car, and must have settlement in full. Further correspondence was had between the parties, and finally suit was brought to recover the sum of \$50.75, the claimed balance due on the two cars in question, the value of the lumber rejected. Suit was started in the justice court, which resulted in a judgment in favor of the defendant, and on appeal taken to the circuit court the trial judge directed a verdict of no cause of action.

It is contended here that the circuit judge erred in holding and instructing the jury that

the contract in question was severable, and that the defendant had a right to reject part of the lumber in question and accept the remainder. It is the contention of the plaintiff that the defendant had purchased these two cars of lumber, of one quality and grade, and as soon as the cars arrived the defendant had a reasonable time in which to inspect the same and ascertain if they complied with the requirements of the contract as to quality and grade, and after such examination defendant was obliged to either accept or reject all of the lumber; and if he accepted a part of the lumber, and then used the same, he was obliged to pay the contract price of all of the lumber. Reliance is placed upon the cases of *Sisson Lumber, etc., Co. v. Haak*, 139 Mich. 383, 102 N. W. 946, and *Columbus & Hocking Coal & Iron Co. v. See*, 169 Mich. 661, 135 N. W. 920.

[1] It is true that it is the rule of law in this state that in an executory contract for the sale of personal property, where there is an implied warranty, the warranty does not survive the acceptance of the goods, and it becomes the duty of the purchaser to make an inspection and reject or pay the contract price, which proposition of law is fully sustained by the two Michigan cases above cited. But the question here is rather whether or not the contract in question is a severable one, and whether or not the defendant could, after inspection, in view of the rule of law here established, reject that part of the lumber which did not meet the specifications. The question of the right of the consignee to reject a portion of the shipment which is below grade or worthless, while accepting the greater part of the shipment, is not involved in the decision of the *Sisson Lumber Co. Case*, supra, and likewise, in the *Columbus & Hocking Coal & Iron Co. Case*, supra, the entire cargo was of an inferior quality, and the consignee accepted the shipment of coal and attempted to make a settlement upon a reduced price because of the alleged inferior quality of the coal. No Michigan case has been called to our attention, nor have we been able to find such a case, in which the precise question here involved was under consideration.

In the case of *McFadden v. Wetherbee & Co.*, 63 Mich. 390, 29 N. W. 881, in which there was under consideration a contract for the delivery to a vendee of pine blocks of a specified quality, and the vendee had failed to reject the blocks at the time of delivery, although advised that they were defective, and paid for the same, this court said:

"The defendant had the right, at the time of the delivery, to reject any and all blocks not

coming up to the standard of the contract; but, if it paid for them at that time, or afterwards, without rejecting any, although complaint was made at their being defective, the defendant nevertheless lost thereby the right in this suit to plead a breach of the contract as far as the blocks so paid for were concerned; nor would it authorize the rejection and non-acceptance of blocks thereafter to be delivered under the contract, without a showing that the blocks so offered to be delivered were also defective. No such showing was made."

So in the instant case, if the defendant had taken into possession the rejected lumber and assumed to dispose of it at a less price, as was done in the Columbus & Hocking, etc., Co. Case, *supra*, there could be no question that under the law in the state the damages thus sustained could not have been recouped in an action to recover for the rejected lumber. But here the defendant moved promptly by notifying the plaintiff the very next day after the inspection of the rejection of the number in question.

[2] In a similar case in Maryland, *Canton Lumber Co. v. Liller*, 107 Md. 146, 68 Atl. 500, the court held that the plaintiff had a right to accept lumber which was up to the grade contracted for, and that by so doing it did not accept the part which was below grade. In its opinion the court said:

"Unless it measured up to the specifications, it was of no practical value to the plaintiff, for the only purpose for which it was ordered, and, not being a dealer equipped for resale, it was of little value to him for any purpose. He was compelled, in order to perform his contract with the railroad company, to purchase without delay other lumber to replace such as should be rejected under proper inspection. Can it be supposed then that it was the intention of either of the parties that if one-half or one-quarter of the lumber passed the inspection, and the remainder was rejected, that the plaintiff could not use the former for the specific purpose for which it was bought, without being required to take also the rejected portion which he could not use? Such a conclusion is as irrational when attributed to the defendant as when attributed to the plaintiff, under all the circumstances of this case. And this construction is supported by the subsequent dealing of the parties with respect to the rejected lumber, which was accepted and removed from Keyser by the defendant. It is true that this alone would not be conclusive, and it would have comparatively little significance if accompanied by a declaration that the acceptance of the rejected lumber was only for the purpose

of reducing thereby the damage sustained, but when unexplained, as in this case, the conduct is most significant of the intention of the parties. As illustrative of this view, it was said in *Richards v. Shaw*, 67 Ill. 222, that the modern rule is that the entirety of a contract of sale is severed by the buyers receiving and retaining a part after the seller has refused or failed to deliver the residue of the specific quantity of goods bargained for.

"The case of *Holmes v. Gregg*, 66 N. H. 621 (28 Atl. 17), relied on by the plaintiff, is directly in point, and meets with our full concurrence. That was a sale of lumber shipped on cars in five lots, three of which were accepted and used by the defendants, and the others, not conforming to the order in quality, were rejected and piled in their yard, where they remained, subject to the plaintiff's order. The defendants seasonably informed the plaintiffs of their action, and tendered the price of the accepted lumber, and the court said: 'Without an express stipulation that the contract was or was not entire, the parties might have understood that it was severable in such a sense that the defendants could accept the lumber that conformed to the contract and reject the rest.'"

We are of the opinion that the trial court was correct in holding that the contract was a severable one, and no error was committed in so charging the jury.

In his reasons for directing a verdict the court also stated that thus severing the contract was in accordance with a custom universal among lumber dealers, and it is contended that this was error because, it is claimed, the testimony in this respect falls far short of establishing such a universal custom as to warrant this conclusion on the part of the court. Being of the opinion that the court arrived at a proper conclusion with respect to the other question, and properly directed a verdict for that reason, it is unnecessary for us to determine whether under the facts in this case the testimony was sufficient to justify a conclusion that a universal custom had been established.

The judgment is affirmed.

BROOKE, C. J., and MOORE and BIRD, JJ., concurred with KUHN, J.

*NOTE.—Severability in Contract of Sale of a Number of Articles.*—The instant case presents a very interesting question, at least in states ruling, as Michigan does, that an implied warranty in an executory contract of sale does not survive acceptance of the goods. Without attaching to a contract for the sale of lumber any special feature because of the kind of goods sold,

as might be claimed for the sale of nursery stock, the instant case draws the conclusion that the contract in question was severable in its nature, so that the rule referred to does not apply. But at least it must be conceded that severability, where a contract does not specifically provide for or against it, must be a question of intention by the parties.

In *Pacific Lumber Co. v. Iowa Windmill & Pump Co.*, 135 Iowa 308, 112 N. W. 771, there was a shipment of lumber in one box car. The lumber was unloaded and assorted, and the good lumber was used and the defective lumber set apart and the seller notified that it was subject to its order, remitting to it the amount for the good lumber. The seller sued for balance as upon contract price as upon an entire sale.

The court said: "It is very difficult to lay down a rule which will apply to all cases, and consequently each case must depend very largely upon the terms of the contract involved. In this case we think it almost conclusive that the parties did not intend the contract in question to be severable. It is hardly conceivable that the plaintiff, living more than two thousand miles away from defendant's place of business, should contemplate the shipment of a car load of lumber, although consisting of pieces of different dimensions, with the understanding or intention that each piece of timber so shipped should constitute the basis of an independent contract, so that the consignee would be at liberty to reject any part of the lumber so shipped and retain the balance. \* \* \* The order itself is for a car, and the simple fact that the dimensions of the timber were specified and the price per thousand named would not make the contract a divisible one."

We are not particularly impressed with this style of reasoning, especially the part of it which refers to the distance the lumber was to be shipped. An implied warranty ought to be as efficacious as an express warranty in the sale of goods, and distance ought not to count as differentiating sales in these days of dealing in interstate commerce. There is too much flexibility in a circumstance of this kind to govern in the meaning of ordinary contracts of the kind involved.

But as it is the shipper's duty, when he ships one or several articles, to ship what is asked for, is not the only risk taken by him, that it or they may be rejected by the purchaser? Is it not to be supposed, that he would prefer an entire, rather than a partial, rejection? Even if this may reasonably be supposed, the purchaser in ordering, should, where there is only an implied warranty, save the right to turn back on the seller the parts of a shipment unfit, according to purchaser's judgment.

We do not think the case of *Canton Lumber Co. v. Liller*, 107 Md. 146, 68 Atl. 500, is a very pointed authority on such a question as was involved in the instant case. The contract there shows that plaintiff was to be supplied with lumber to build a tipple for a railroad company, the lumber being subject to inspection by agents of the railroad company. Here it would seem contemplated by the parties that only such parts of a shipment as would get by these agents was to be

deemed really shipped. It does not seem that the lumber company could submit this lumber to independent inspectors and when they culled from the mass what was regarded by them as objectionable, the shipment could be deemed an entire one. The court said: "The plaintiff did not agree to purchase this lumber for sale to others. He had no business place for its storage or deposit, no customers resorting to him to buy, and no salesmen skilled to secure such customers. He contracted for this lumber to be put by him into the tipple and sand house which he had come under a legal obligation to erect for the B. & O. R. R. within a prescribed time and out of material suitable for those particular structures. \* \* \* He could not put into these structures such lumber as he might choose, but only such as should pass the inspection stipulated for." Here are good reasons, if not for separability, at least for the conclusion that the shipment only made a sale of such part thereof, as should pass that inspection.

The case of *Holmes v. Gregg*, 66 N. H. 621, 28 Atl. 17, which is spoken of by the Maryland case as being directly in point, seems not to be, further than its proving to be a severable contract. But what made it such is not disclosed. The case is very brief and the court said: "The parties might have understood that it (the contract of sale) was severable in the sense that the defendants could accept the lots that conformed to the contract and reject the rest." Here it is to be noted that rejection was of some of the car lots—three of which were accepted and two were rejected. It would have been another question to accept part of a car and reject the remainder. It seems to us there was nothing in the form of the contract in the instant case to show its differing from an ordinary contract of sale, nor are any circumstances in evidence which tend to show severability. C.

## BOOK REVIEWS.

### LIBRARY OF CONGRESS GUIDE TO THE LAW OF SPAIN.

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### BOOKS RECEIVED.

**Law of Wills, Executors and Administrators.** By James Schouler, LL.D., Author of Treatises on "Domestic Relations," "Bailments" and "Personal Property," etc. Fifth Edition. In two volumes: Vol. I, Wills; Vol. II, Executors and Administrators. Price, \$15.00. Albany, N. Y. Matthew Bender & Company, Incorporated. 1915. Review will follow.

**The Hague Arbitration Cases.** Compromis and Awards with maps in cases decided under the provisions of the Hague Conventions of 1899 and 1907 for the pacific settlement of international disputes and texts of the conventions. By George Grafton Wilson, LL.D., Professor of International Law in Harvard University. Boston and London. 1915. Ginn and Company, Publishers. Price \$3.50. Review will follow.

**Outline of International Law.** By Arnold Bennett Hall, J. D., Assistant Professor of Political Science, University of Wisconsin. Price \$1.75. LaSalle Extension University. Chicago. 1915. Review will follow.

### HUMOR OF THE LAW.

**Magistrate**—The evidence shows that you threw a kettle at your husband.

**Culprit**—It shows more than that, yer Honor; it shows that I 'it 'im!

A man arrested for stealing chickens was brought to trial. The case was given to the jury, who brought him in guilty, and the judge sentenced him to three months' imprisonment.

The jailer was a jovial man, fond of a smile, and, feeling particularly good on that particular day, considered himself insulted when the prisoner, looking around the cell, told him it was dirty and not fit for a hog to be put in.

One word brought on another till finally the jailer told the prisoner if he did not behave he would put him out. To which the prisoner replied: "I'll give you to understand, sir, that I have as much right here as you have."—Pittsburgh Chronicle Telegraph.

A Scottish prison chaplain recently appointed, entered one of the cells on his first round of inspection and thus addressed the prisoner who occupied it:

"Well, my man, do you know who I am?"

"No, nor I dinna care!" was the nonchalant reply.

"Well, I'm your new chaplain."

"Oh, ye are? Then I hae heard o' ye before."

"And what did you hear?" returned the chaplain, his curiosity getting the better of his dignity.

"Well, I heard that the last two kirks ye were in ye preached them baith empty; but I can say ye willna find it quite sae easy to do the same wi' this."—Tit-Bits.

He was a witness in a case in the Police Court.

"What is your name?" inquired Prosecutor Robinson.

"Mah name?" from the darkey incredulously.

"I'm talking to you," snapped the prosecutor.

"Well, suh, mah name is Hallowed Hopkins," answered the negro.

"Hallowed—Hallowed," gasped the judge.

"Where did you get that name?"

"Frum mah maw," answered the negro. "It am frum de Scriptuahs."

"From the Scriptures? What part of the Scriptures?"

"Doan you all r'membah, Judge, wheah it says 'Hallowed be thy name?'"

The judge recalled the passage.—Louisville Times.

## WEEKLY DIGEST

## Last Report and of ALL the Federal Courts.

*Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the Web. Pub. Co., St. Paul, Minn.*

Alabama	3, 11, 15, 16, 17, 18, 19, 23, 37, 38, 39, 45, 54, 57, 58, 59, 60, 62, 64, 65, 66, 67, 68, 76, 79, 89, 92, 98, 100, 104, 107, 108.
California	35, 40, 46, 69, 70, 82, 96
Colorado	85
Connecticut	13, 34, 49, 52, 80, 81, 97
Georgia	10, 73, 113
Kansas	83
Louisiana	53, 90
Maryland	22, 27, 41, 88, 95, 99, 114, 117
Michigan	43
Minnesota	28
Mississippi	9, 42, 44, 55
Missouri	20, 61, 71, 94
Nevada	106, 116
New Hampshire	77
New Jersey	4, 51, 78, 105, 118
New Mexico	50
New York	91, 111
Ohio	115
Oklahoma	2, 63, 110
Oregon	1, 24, 26, 75
Pennsylvania	5, 25
South Carolina	12
South Dakota	33, 47
U. S. C. C. App.	6, 7, 8, 21, 32, 36, 72, 74, 84, 86, 87, 101, 102, 109, 112.
United States D. C.	30, 31, 48
Utah	14, 56, 93, 103

1. **Action**—Friendly Suit.—A suit by a taxpayer to test the power of a city to contract for the construction of a railroad as authorized by the city charter will not be dismissed as fictitious merely because it is a friendly suit.—Pearce v. City of Roseburg, Or., 150 Pac. 855.

2. **Animals**—Estrays.—In sales of animals under the estray laws, all provisions of same must be strictly followed; otherwise the buyer acquires no title.—Gibson v. Linthieum, Okla., 150 Pac. 908.

3. **Assault and Battery**—Argument of Counsel.—A charge, that where a man is free from fault in bringing on a difficulty he is justified in using such violence as is necessary to protect himself against bodily harm, was argumentative and properly refused.—Murray v. State, Ala. App., 69 So. 354.

4. **Attachment**—Recording Act.—A judgment in attachment obtained after the filing of a bill against the debtor for specific performance of an agreement to convey and notice of the debtor's conveyance and the complainant's rights thereunder did not protect the judgment creditor under the recording act.—Busath v. Prival, N. J., Ch. 95, Atl. 136.

5. **Attorney and Client**—Action.—A bill to compel the reconveyance of realty, conveyed by plaintiff to his attorney for services held properly dismissed, where the fraud relied on was but an inference drawn from the fact that the realty was worth more than the services.—Bersch v. Rust, Pa., 95 Atl. 108.

6. **Bankruptcy**—Act of.—If a receivership for an insolvent corporation, although procured in a suit against it, was actually procured by and in behalf of the corporation, it constitutes an act of bankruptcy under Bankr. Act July 1, 1898, § 3a (4).—James Supply & Hardware Co. v. Dayton Coal & Iron Co., U. S. C. C. A., 223 Fed. 991.

7.—**Estoppel**.—An involuntary bankruptcy proceeding is not void because facts show that the petitioners are estopped from taking advantage of the act of bankruptcy relied on.—In re Bolognesi, U. S. C. C. A., 223 Fed. 771.

8.—**Mortgage Creditor**.—A creditor of a bankrupt corporation whose debt is secured by a valid pledge of its mortgage bonds, is not required to prove his claim as a general creditor to entitle him to have his bonds participate in the mortgage fund.—Butterfield v. Woodman, U. S. C. C. A., 223 Fed. 956.

9. **Banks and Banking**—Collection.—Where a check was sent for collection to the bank on which it was drawn and such bank, after charging it to the drawer, failed to transmit the funds to the collecting bank and in a few days closed its doors, held that the drawer was discharged from further liability.—Planters' Mercantile Co. v. Armour Packing Co., of Louisiana, Miss., 69 So. 293.

10. **Bigamy**—Presumption.—The presumption, founded on cohabitation and repute, that a marriage has taken place, will not prevail over proof of a subsequent marriage in fact by one of the parties to a third person, so as to invalidate the latter marriage.—Brown v. State, Ga. App., 85 S. E. 951.

11.—**Proof of Marriage**.—In prosecution for bigamy marriage may be proved by cohabitation and the confessions of the party, and it is not necessary to produce the record or the testimony of a witness.—Phillips v. State, Ala. App., 69 So. 356.

12.—**Voidable Marriage**.—Where defendant's marriage to the daughter of his half-sister was voidable only and no proceeding to have it declared invalid was ever commenced, his marriage to another woman after separation from his first wife was bigamous.—State v. Smith, S. C., 85 S. E. 958.

13. **Bills and Notes**—Estoppel.—That the maker, after paying an overdue note, permitted the payee to retain same held not to estop him from denying liability on the note to an assignee receiving same after such payment, and after alteration of the note as to date and time of payment.—Fairfield County Nat. Bk. v. Hammer, Conn., 95 Atl. 31.

14. **Brokers**—Exclusive Agency.—Defendant owner of realty held not liable to real estate brokers, to whom he had quoted a price, without giving an exclusive agency, after a sale and payment of commission to another broker, to whom he had likewise quoted a price.—Young v. Whitaker, Utah, 150 Pac. 972.

15. **Burglary**—Indictment.—Under Code 1907, § 6415, an indictment for burglary in having entered an office, described as a structure or inclosure, is bad unless it contains the averment that it was constructed or made specially for the keeping of goods or other valuable thing.—Adams v. State, Ala. App., 69 So. 357.

16. **Carriers of Goods**—Commission Merchant.—Commission merchant to whom oranges were consigned to sell and to pay the freight held liable to the carrier for an undercharge, notwithstanding the merchant had already sent the proceeds to the owner.—*S. F. Cornelius & Co. v. Central of Georgia R. Co.*, Ala., 69 So. 331.

17.—Concealment by Shipper.—A carrier, though ignorant of the contents of the drawers or a dresser in a shipment of household goods, is liable for their loss, absent fraud, or imposition by shipper in concealing their contents.—*Louisville & N. R. Co. v. Risenstein*, Ala. App., 69 So. 243.

18.—Delay.—Where delay in the delivery of coal caused the consignee a loss equivalent practically to the value of the coal, the consignee may refuse to receive the shipment.—*Central of Georgia Ry. Co. v. Goodwater Mfg. Co.*, Ala. App., 69 So. 343.

19. **Carriers of Passengers**—Alighting from Car.—A passenger injured while alighting from a street car does not have the burden of showing that the step of the car was in an unsafe condition, caused by the negligence of the company.—*Birmingham, E. & B. R. Co. v. Hoskins*, Ala. App., 69 So. 339.

20.—Boarding Car.—In an action by one injured in attempting to board defendant's street car, evidence of his intoxication at that time was admissible, but not his habitual drunkenness, unless his intoxication was denied.—*Boggs v. Harvey*, Mo. App., 178 S. W. 867.

21.—Degree of Care.—A railroad carrier is bound to use the utmost care, consistent with the nature and extent of its business, to guard against all dangers to passengers while passing to and from its trains.—*New York, N. H. & H. R. Co. v. Lincoln*, U. S. C. C. A., 223 Fed. 896.

22.—Negligence.—A carrier may be liable for injuries sustained through its negligence in permitting a step to be in an unsafe condition on account of ice.—*Hanway v. Baltimore & O. R. Co.*, Md., 95 Atl. 160.

23. **Chattel Mortgages**—Identity of Property.—In detinue for a mule by subsequent purchasers from the mortgagor against the mortgagee, the question of the identity of the mule purchased with that covered by the mortgage was for the jury.—*Dunaway & Lambert v. Stickney*, Ala., 69 So. 232.

24. **Commerce**—Common Law Liability.—The Interstate Commerce Law, which was designed to prevent preferences, does not prohibit a carrier from assuming the common-law liability in carrying goods from one state to another.—*Grice v. Oregon-Washington R. & Navigation Co.*, Ore., 150 Pac. 862.

25.—Interstate Commerce.—A railroad employee held engaged in interstate commerce within the federal Employers' Liability Act, where he was struck by a train while he was waiting for a freight train to pass over another track on which he was bonding rails and the tracks were used in interstate commerce.—*Glunt v. Pennsylvania R. Co.*, Pa., 95 Atl. 109.

26. **Constitutional Law**—Discrimination.—Const. art. 1, § 20, prohibiting granting of special privileges or immunities, is a limitation on the council of a city and prevents any discrimination against non-residents in occupation or license taxes.—*Ideal Tea Co. v. City of Salem*, Ore., 150 Pac. 852.

27.—Impairment of Contract.—The obligation of contracts is not impaired by regulation of water rates under the police power, though a prior contract for furnishing water be affected.—*Yeatman v. Towers*, Md., 95 Atl. 158.

28. **Contracts**—Legality.—Where a contract prescribes a time within which to bring action,

which is shorter than the statutory period, such provision is valid if reasonable, but not otherwise.—*Dechter v. National Council of Knights and Ladies of Security*, Minn., 153 N. W. 742.

29.—Undisclosed Principal.—One who signed a sealed contract wherein he described himself as attorney and agent held personally liable; his principal not being in any way described.—*Manning v. Embert*, Md., 95 Atl. 64.

30. **Copyrights**—License Agreement.—License agreement for use of copyrighted musical composition in manufacture of sound records does not permit licensee to distribute on separate sheets the words of the composition.—*F. A. Mills v. Standard Music Roll Co.*, U. S. D. C., 223 Fed. 849.

31. **Corporations**—Foreign Corporation.—Corporation, constructing oil tanks in state of its incorporation and shipping them to other states for erection by its employees, held doing business, so as to be subject to suit there.—*Nickerson v. Warren City Tank & Boiler Co.*, U. S. D. C., 223 Fed. 843.

32.—Interest.—A trust company, holding mortgage bonds of a corporation and notes executed by a purchaser of a plant of the corporation, held liable to account for interest received on the notes.—*Baltimore Trust Co. v. Bellevue Mills Co.*, U. S. C. C. A., 223 Fed. 753.

33.—Ostensible Authority.—The ostensible authority of the secretary and manager of an elevator company held not to authorize the owner of bank stock to assume that such manager had authority to purchase such bank stock with the company's funds.—*Porter v. Lien*, S. D., 153 N. W. 905.

34.—Partnership.—That the incorporators of a construction company entered into a contract with a street railway company for street paving and with another company for materials, in their individual names, without the addition of the word "Incorporated," held not to make them liable as partners.—*United States Wood Preserving Co. v. Lawrence*, Conn., 95 Atl. 8.

35.—Subscription.—Subscription to stock in hotel company expressly referring to a prior list of subscribers and agreement to subscribe to the stock of such company, although the list referred to was not actually annexed to the instrument, would be construed with such list.—*Beedy v. San Mateo Hotel Co.*, Cal. App., 150 Pac. 810.

36.—Unliquidated Claim.—An unliquidated claim against a corporation for conversion held not an indebtedness, within a reorganization agreement under which preferred mortgage bonds were issued to pay unsecured indebtedness, except as to property converted by a receiver, prior to the agreement.—*Hinrichs v. Mississippi Valley Trust Co.*, U. S. C. C. A., 223 Fed. 995.

37. **Criminal Law**—Burglary.—Where a state medical examiner, through an agent, entrapped defendant, an employe about the State Capitol, into entering his office and abstracting therefrom the examination paper of the agent, the defendant was not guilty of burglary.—*Adams v. State*, Ala. App., 69 So. 357.

38.—Former Conviction.—Where one accused of a violation of a municipal ordinance, which was also a violation of the state law, was discharged in a prosecution instituted by the city because limitations had run, he cannot plead that discharge as a conviction barring prosecution under the state law.—*City of Birmingham v. Brown*, Ala. App., 69 So. 263.

39.—Instructions.—Where the legal presumption of defendant's innocence and the necessity for unanimity of belief as to his guilt and the degree of proof required were fully covered by given charges, the refusal of a requested charge thereon was not reversible error.—*Lacy v. State*, Ala. App., 69 So. 244.

40. **Damages**—Measure of.—Where a contractor has been prevented by the owner from completing the work, held that the measure of damages is the difference between the unpaid part of the contract price and the reasonable cost of completing the work.—*Connell v. Higgins*, Cal., 150 Pac. 769.

41. **Death**.—Interest in Life.—A son who is 23 years old, living with his father and receiving \$200 a year and small sums of money from him, does not have a sufficient pecuniary interest in his father's life to maintain an action under Code Pub. Gen. Laws 1904, art. 67.—*State v. Baltimore & O. R. Co., Md.*, 95 Atl. 65.
42. **Deeds**.—Retention of Title.—Where an owner divided a plantation into blocks and strips for roads, and conveyed blocks, reserving for public use strips within the calls of the deeds, he retained no title to the strips.—*McCrohan v. Parker, Miss.*, 69 So. 218.
43. **Undue Influence**.—Undue influence to set aside a deed cannot be predicated on mere opportunity for its exercise.—*Pritchard v. Hut-ton, Mich.*, 153 N. W. 705.
44. **Equity**.—Cross-Bill.—Where complainant agreed that original bill might be dismissed and decree entered on the cross-bill of the defend-ants, some of whom were infants, the decree was not void because not based on evidence supporting the allegations of the cross-bill.—*Eubanks v. McLeod, Miss.*, 69 So. 289.
45. **Estoppel**.—Plea in Abatement.—In an action against telegraph company for breach of contract defendant, who by plea in abatement required parties who had brought individual suits to take a non-suit and to join as necessary parties plaintiff, was estopped from plead- ing in abatement the pendency of such other suits when the complaint was amended to parties.—*Western Union Telegraph Co. v. Emerson, Ala. App.*, 69 So. 335.
46. **Reliance on Promise**.—There was not a reliance on plaintiff's consent, necessary for his estoppel, where he did not see defendant's cut- ting of a new channel till it was nearly com- pleted, and then simply made no objection.—*Miller v. More, Cal.*, 150 Pac. 775.
47. **Evidence**.—Books and Papers.—A card in- dex record, used in a wholesale house to show the state of a customer's account, is admissible in an action to recover a balance due on mer- chandise, when authenticated by evidence of the persons by whom it was kept.—*Haley & Lang Co. v. Del Vecchio, S. D.*, 153 N. W. 898.
48. **Res Gestae**.—Exclamation of a third person as to failure of engineer to sound whistle held admissible as a part of the res gestae for the special purpose of showing that the at- tention of a witness was particularly called to the matter.—*Emens v. Lehigh Valley R. Co., U. S. D. C.*, 223 Fed. 810.
49. **Executors and Administrators**.—Distribu- tees.—Distributees of intestate property are the beneficial owners thereof, subject to payment of debts, the distribution being merely a parti- tion among them of property to which the law gives them title, the administrator holding the legal title only for the purposes of administra- tion.—*Hotchkiss v. Goodno, Conn.*, 95 Atl. 26.
50. **Title to Personality**.—On an ancestor's death, title to personality passes direct to per- sonal representatives; and hence heirs and lega- tees have no right of possession thereto until the close of the administration, except as other- wise derived.—*Smith v. Steen, N. M.*, 150 Pac. 927.
51. **Gas**.—Certiorari.—Where cities and a gas company by separate certioraris challenged order of board of public utility commissioners fixing a gas rate, the cities were entitled to deter- minations, on the merits of their claims, that that rate was too high, despite judgment on the gas company's certiorari.—*City of Passaic v. Board of Public Utility Com'rs, N. J.*, 95 Atl. 127.
52. **Guaranty**.—Discharge.—Guarantor of pay- ment of rent under a lease permitting sublet- ting held not discharged from liability by a permit to sublet without a restriction contained in the original lease.—*Sagal v. Mann, Conn.*, 95 Atl. 6.
53. **Health**.—Ordinance.—An ordinance of the board of health of the city of New Orleans pro- viding for the rat-proofing of structures in the city held valid.—*City of New Orleans v. Ricker, La.*, 69 So. 273.
54. **Homicide**.—Aiding and Abetting.—Where defendant aided and abetted another in murder- ing deceased, he is as liable as if he had actual- ly done the deed.—*Wilson v. State, Ala. App.*, 69 So. 295.
55. **Dying Declaration**.—A dying declara- tion must be restricted to the act of killing and the circumstances immediately attending the act and forming part of the res gestae.—*Marley v. State, Miss.*, 69 So. 210.
56. **Harmless Error**.—In a prosecution for murder, where there was no dispute but that the deceased were killed with a 38-caliber auto- matic pistol, the admission of testimony of a medical witness not qualified on the subject that, in his opinion, a wound was caused by a 38-caliber bullet, was harmless.—*State v. Hill- strom, Utah*, 150 Pac. 935.
57. **House as Castle**.—The doctrine that the owner of a house or his invited guest, when unlawfully assaulted therein, may use all neces- sary force to repel his assailant, without first retreating to avoid the necessity of killing, ap- plies only to the house, and not to the yard.—*Thomas v. State, Ala. App.*, 69 So. 315.
58. **Intent**.—Where an assault is committed by means calculated to produce death, but death does not ensue, the state must prove accused's criminal intent to constitute the act a felony.—*Williams v. State, Ala. App.*, 69 So. 376.
59. **Involuntary Manslaughter**.—Where ac- cused was intentionally pointing his gun at de- ceased, but did not intend to shoot him, and the killing was accidental, he is guilty at least of involuntary manslaughter.—*Campbell v. State, Ala. App.*, 69 So. 322.
60. **Self-Defense**.—Where defendant killed a police officer, who first drew a pistol, defend- ant could not excuse his act as in self-defense, unless the officer's drawing of his weapon was manifestly to shoot defendant, or would have appeared so to a reasonable man.—*King v. State, Ala. App.*, 69 So. 345.
61. **Threats**.—Threats alone do not justify the person threatened in killing on sight on the ground of self-defense, unless the threatener was apparently making some effort to carry them into effect.—*Gilkey v. Sovereign Camp of Woodmen of the World, Mo. App.*, 178 S. W. 875.
62. **Husband and Wife**.—Abandonment.—Hus- band, whom wife abandoned voluntarily and without his fault to live with her father, held not liable for reasonable value of services to wife of physician called to attend her in child- birth without husband's authority.—*Johnson v. Coleman, Ala. App.*, 69 So. 318.
63. **Indians**.—Preferential Right.—A purchase by a Cherokee citizen by blood from an inter- married noncitizen of improvements on land owned by the Cherokee Nation and made prior to the passage of Act Cong. March 2, 1907, did not vest in the purchaser any interest in the improvement or give him any preferential right to file on land legally allotted to another Chero- kee citizen by blood.—*Thomas v. Glenn, Okla.*, 150 Pac. 837.
64. **Indictment and Information**.—Burden of Proof.—Under Code 1907, § 7142, where a de- fendant is indicted under the allegation that his true name is unknown, such true name is im- material, unless proof shows the grand jury knew the name when it returned the indict- ment—a point as to which the defendant has the burden of proof.—*Oliveri v. State, Ala. App.*, 69 So. 359.
65. **Demurrer**.—Omission from count of an indictment of the conclusion "against the peace and dignity of the state of Alabama," required by Code 1907, § 7131, and Const. 1901, § 170, held not to make count demurrable, where the indictment itself contained such a conclusion.—*Norman v. State, Ala. App.*, 69 So. 362.
66. **Evidence**.—That defendant acknowl- edged to searching officers that she had liquor in her house and told where it was, was not conclusive of her innocent purpose in keeping it.—*Merriwether v. City of Tuscaloosa, Ala. App.*, 69 So. 258.
67. **Fatal Defect**.—Indictment for the lar- ceny of a pistol from a warehouse of a certain fertilizer company was not fatally defective as stating the name of the fertilizer company as the "Fertilize Company," the error being self- correcting.—*Kirk v. State, Ala. App.*, 69 So. 350.

68.—**Necessary Averment**.—Though the proof must show that the offense was committed within the territorial jurisdiction of the court, it is not an essential averment in the indictment or complaint.—*Whaley v. State*, Ala. App., 69 So. 384.

69.—**Infants**.—**Juvenile Court**.—Though under the juvenile court law the reviewing court may determine the issues on the preponderance of the evidence, the superior advantage of the trial court in having seen the witnesses must be considered regarding their credibility.—*In re Canton*, Cal. App., 150 Pac. 794.

70.—**Insurance**.—**Change of Beneficiary**.—Where constitution and by-laws of a mutual benefit association permit change of beneficiary, the beneficiary named does not acquire an indefeasible right.—*Supreme Lodge of Fraternal Brotherhood v. Price*, Cal. App., 150 Pac. 803.

71.—**Death in Violation of Law**.—In a suit on a certificate, providing that it should be void if insured died in consequence of violating the law, defendant insurer should have proved affirmatively, not only that insured was killed by another, but that such other acted in self-defense.—*Gilkey v. Sovereign Camp of Woodmen of the World*, Mo. App., 178 S. W. 875.

72.—**Void Policy**.—A corporation, issuing bonds by a deed of trust on all its property to secure a renewal note, held to incur its personal property, within a fire policy declaring that the same should be void on the property becoming incumbered.—*Hartford Fire Ins. Co. of City of Hartford, Conn., v. Downey*, U. S. C. A., 223 Fed. 707.

73.—**Interest**.—**Installments**.—Where a lender, on default, elected to sue for the entire loan, payable in monthly installments, held, that it could not recover the specified 12 per cent interest from the filing of the petition, but could only recover legal interest from the date of the loan, crediting the payment made as a partial payment as of the date when made.—*South Georgia Mercantile Co. v. Lance*, Ga. App., 85 S. E. 952.

74.—**Landlord and Tenant**.—**Damages**.—The measure of damages recoverable by a lessor for failure of the lessee to erect a building required by the lease held not different because the lessor was also a lessee for 99 years, and not owner of the fee.—*Illinois Surety Co. v. O'Brien*, U. S. C. A., 223 Fed. 933.

75.—**Eviction**.—To constitute eviction of a tenant by act of the landlord, it is not essential that the act be of a permanent character, but is sufficient that it deprive the tenant of the free enjoyment of the premises or some part thereof or appurtenances thereto.—*Hotel Marion Co. v. Waters*, Ore., 150 Pac. 865.

76.—**Larceny**.—**Defined**.—Larceny is a trespass or wrong to the possession, and, where one gains possession of property so as to constitute a bare charge or custody, it does not divest the owner's constructive possession, and the offense is larceny.—*Ludlum v. State*, Ala. App., 69 So. 255.

77.—**Life Estates**.—**Will**.—Will, authorizing devisee to use property during life for his support or benefit, empowers him to use it to promote his prosperity and personal happiness.—*Weston v. Second Orthodox Congregational Church*, N. H., 95 Atl. 146.

78.—**Master and Servant**.—**Dependency**.—That deceased left dependent brothers and sisters under the age of 14 warrants an inference that they would not at the end of the three years for which wages were awarded have reached 16 years, so that they were minor incapacitated dependents within *Workmen's Compensation Act*, § 2.—*Havey v. Erie R. Co.*, N. J. Sup., 95 Atl. 124.

79.—**Employers' Liability Act**.—**Operator of coal mine is not liable, under Employers' Liability Act, for injuries to employee by absence of bumpers on a tram car, in absence of proof of time bumpers had been broken off**.—*Sloss-Sheffield Steel & Iron Co. v. Westbrook*, Ala. App., 69 So. 311.

80.—**Independent Contractor**.—The owner of a building which is being constructed by inde-

pendent contractors owed to the servant of such an independent contractor, engaged in painting an elevator shaft, no duty to see that the place where he worked was kept in safe condition.—*Douglass v. Peck & Lines Co.*, Conn., 95 Atl. 22.

81.—**Independent Contractor**.—The servant of an independent contractor for the erection of a freight elevator, operating an appliance at the request of the owners' agent, did not become a servant of the owner so as to render it liable for his negligence.—*Douglass v. Peck & Lines Co.*, Conn., 95 Atl. 22.

82.—**Ordinance**.—Under an ordinance making it unlawful to maintain any scaffold unless of sufficient strength to support the weight thereon and of sufficient width to prevent one working thereon from falling, a plank used by a painting foreman to rig falls in a light-well was not a "scaffold."—*Peterson v. Beck*, Cal. App., 150 Pac. 788.

83.—**Workmen's Compensation Act**.—Where, in an action under the Workmen's Compensation Act, it appeared that the mother of the deceased employee had been wholly dependent on his earnings for her support, an award of three years' wages in a lump sum, under § 36, was not an abuse of discretion.—*McCracken v. Missouri Valley Bridge & Iron Co.*, Kan., 150 Pac. 832.

84.—**Mines and Minerals**.—**Breach of Contract**.—Under contract for sale of mining claims, failure to secure patents because minerals were exhausted held not a breach entitling purchaser to rescind; the parties having dealt only with the possessory title.—*Trinity Gold Dredging & Hydraulic Co. v. Beaudry*, U. S. C. A., 223 Fed. 739.

85.—**Burden of Proof**.—One seeking to initiate a claim to mining premises located by another must prove that the annual labor thereon has not been performed, thereby showing that the premises are open to location.—*Lancaster v. Coale*, Colo. App., 150 Pac. 821.

86.—**Monopolies**.—**Conspiracy**.—That a majority of the stock of corporations was owned by a corporation did not show that the former corporations participated in a conspiracy to injure another suing under *Anti-Trust Act*, § 7.—*Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, U. S. C. A., 223 Fed. 881.

87.—**Mortgages**.—**Equitable Right**.—Mortgage held enforceable for benefit of M. who acquired bonds after transferor had contracted to convey free from incumbrances; M. having previously had an equitable right to the bonds.—*Stearns Lighting & Power Co. v. Central Trust Co.*, U. S. C. A., 223 Fed. 962.

88.—**Municipal Corporations**.—**Nuisance**.—On trial for failing to abate a nuisance on a tract of accused commonly designated as a street, evidence as to how long a saloon and stores along the tract had been there held irrelevant on the issue of the existence of a street by dedication and acceptance.—*Canton Co. v. State*, Md., 95 Atl. 58.

89.—**Penalty**.—An action of debt for recovery of the penalty fixed for violation of a municipal ordinance may be brought by the city after the expiration of the time within which a criminal prosecution must be instituted.—*City of Birmingham v. Brown*, Ala. App., 69 So. 263.

90.—**Public Policy**.—Whether the existence of bubonic plague in a city involves such danger as to require the rat-proofing of all buildings and structures, held a question of public policy for the legislative department, under *Act No. 173 of 1912*, § 7.—*City of New Orleans v. Ricker*, La., 69 So. 273.

91.—**Streets**.—The title to the streets of the city of New York rests in the municipality as trustee for the public, and no grant or permission can be legally given that will interfere with their use by the public.—*Acme Realty Co. v. Schinas*, N. Y., 109 N. E. 577.

92.—**Names**.—**Indictment**.—In an indictment against "Willie Walling," the name "Willie" is one and the same with the name "William" so that the indictment was good as against "William Thomas Walling," ignoring the middle name.—*Walling v. State*, Ala. App., 69 So. 236.

93. **Negligence**—Implied Warranty.—In an action to recover for death of and injury to plaintiff's horses from administering boiled linseed oil sold by defendants, instead of raw linseed oil, as called for, held, that plaintiff was not negligent in not inspecting the oil before administering it.—*Wright v. Howe*, Utah, 150 Pac. 956.

94. **Last Chance Doctrine**.—The last chance doctrine is that, if defendant saw or could have seen plaintiff in a place of peril in time by the exercise of ordinary care with the means at command to have avoided the accident, he is liable.—*Cull v. McMillan Contracting Co.*, Mo. App., 178 S. W. 868.

95. **Nuisance**—Injunction.—A landowner held entitled to injunctive relief against oil company conveying oil through pipes to large storage tank adjacent to his premises, and maintaining about such tank large number of empty oil barrels and a shed containing greases and other inflammable substances.—*Hendrickson v. Standard Oil Co.*, Md., 95 Atl. 153.

96. **Partnership**—Holding Out.—Existence of a partnership as to third persons is to be determined by the contract as a whole, with the conduct and dealings with the world of the parties to it.—*Westcott v. Gilman*, Cal., 150 Pac. 777.

97. **Holding Out**.—A person who holds himself out as a partner, or permits others to do so, is liable as such to third persons who give credit to the firm upon the faith of his connection therewith.—*United States Wood Preserving Co. v. Lawrence*, Conn., 95 Atl. 8.

98. **Perjury**—Materiality.—Whether accused was armed when he left premises he was accused of burglarizing is material, and false swearing as to that matter constitutes perjury.—*McDaniel v. State*, Ala. App., 69 So. 351.

99. **Principal and Agent**—Authority of Agent.—The liability of a principal for debts incurred by his agent is determined not merely by the apparent authority of the agent, but by that authority which the creditor was justified, with reasonable care and prudence, in believing that the principal had conferred on the agent.—*Ox-weld Acetylene Co. v. Hughes*, Md., 95 Atl. 45.

100. **Railroads**—Burden of Proof.—Where a fire originated from sparks from a railroad engine, the company has the burden of showing, not only that the engine was properly equipped and handled, but that it was properly constructed.—*Southern Ry. Co. v. E. L. Kendall & Co.*, Ala. App., 69 So. 328.

101. **Sales**—Bill of Lading.—A seller held entitled to maintain an action for the purchase price of goods sold and shipped, although the bill of lading was taken in its own name as consignee.—*Lipschitz v. Napa Fruit Co.*, U. S. C. C. A., 223 Fed. 698.

102. **Rescission**.—A buyer, accepting and paying for part of the goods, held not entitled to rescind because of defects in the quality, but his remedy is by offset or recoupment.—*Baer Grocer Co. v. Barber Milling Co.*, U. S. C. C. A., 223 Fed. 969.

103. **Warranty**.—Where a contract of sale required notice of breach to be given both to the seller and his agent, failure to give notice to the seller precluded a reliance on the warranty, though notice was given to the agent.—*Consolidated Wagon & Machine Co. v. Barben*, Utah, 150 Pac. 949.

104. **Seduction**—Defined.—If accused by arts or blandishments tempted prosecutrix to surrender her virtue, he is guilty of seduction, though he only praised her beauty, etc.—*Brand v. State*, Ala. App., 69 So. 379.

105. **Taxation**—Assessment.—The state of New Jersey held not entitled to assess taxes on securities delivered to the executors of a non-resident legatee, where the estate of the owner of such securities, a nonresident testatrix, had paid taxes upon them, and they had been received by the executors of the legatee in lieu of cash.—*Penfold v. Edwards*, N. J. Sup., 95 Atl. 128.

106. **Tangible Property**.—Property of an express company doing interstate and intrastate

business is in character tangible and intangible, and the situs for taxation of the intangible property is where the tangible property is located.—*State v. Wells Fargo & Co.*, Nev., 150 Pac. 886.

107. **Telegraphs and Telephones**—Damages.—In an action against a telegraph company for failure to deliver a telegram, the necessary parties plaintiff entitled to a joint recovery were at least entitled to recovery of nominal damages or that damage which they jointly suffered.—*Western Union Telegraph Co. v. Emerson*, Ala. App., 69 So. 335.

108. **Exemption from Liability**.—A telegrapher negligence in delivery and transmission of messages by printing stipulations on the graph company cannot exempt itself of liability blanks on which the telegrams are to be written.—*Western Union Telegraph Co. v. Baker*, Ala. App., 69 So. 246.

109. **Trial**—Instructions.—An instruction permitting the jury, in weighing defendant's testimony, to take into consideration the fact that in his verified answer he explicitly denied important allegations of the complaint, which he afterward admitted, held not erroneous.—*Lipschitz v. Napa Fruit Co.*, U. S. C. C. A., 223 Fed. 698.

110. **Trusts**—Constructive Trust.—Where money fraudulently obtained and invested in land, the title to which is taken in the wrongdoer's name, a constructive trust results and follows the land, unless it has passed to a purchaser for value without notice.—*Success Realty Co. v. Trowbridge*, Okla., 150 Pac. 898.

111. **Excess Trust**.—Where one trust company upon receiving funds from another for the purchase of its own stock, gave back to the other bank an instrument reciting that it held the funds for that purpose and would hold the stock when purchased in trust, there was an express trust.—*Madison Trust Co. v. Carnegie Trust Co.*, N. Y., 109 N. E. 580, 215 N. Y. 475.

112. **Vendor and Purchaser**—Option.—One who executes a contract giving an option for the purchase of lands is to be regarded as the vendor, in such sense as to put the purchaser on inquiry as to his relation to the title.—*Thompson & Ford Lumber Co. v. Dillingham*, U. S. C. C. A., 223 Fed. 1000.

113. **Waters and Water Courses**—Nuisance.—The right of a company, under Civ. Code 1910, § 3634, to build a dam does not entitle it to so build or maintain it as to cause a nuisance injurious to the health of the adjacent community.—*Central Georgia Power Co. v. Nolen*, Ga., 85 S. E. 945.

114. **Police Power**.—The police power of the state extends, not merely to regulating rates at which water shall be supplied, but to regulation of other matters connected with the service afforded to the public.—*Yeatman v. Towers*, Md., 95 Atl. 158.

115. **Rates**.—Where an ordinance fixing water rates was accepted and no referendum invoked by the electors, or complaint filed with the state public service commission, under Page & A. Gen. Code, § 614-44, the ordinance became binding.—*State v. Burris*, Ohio, 109 N. E. 591.

116. **Surplus Water**.—An owner of land on which surplus waters exist is the owner of the waters and may consent to others acquiring rights therein.—*Bidleman v. Short*, Nev., 150 Pac. 834.

117. **Wills**—Revocation.—Where a testatrix, after executing a will, subsequently by deed of trust transferred the legal title to the property, and procured a leasehold under power reserved, an implied revocation of the will was thereby worked, leaving her possessed merely of a leasehold estate upon which the will could operate.—*Krieg v. McComas*, Md., 95 Atl. 68.

118. **Testamentary Disposition**.—The act of a niece in depositing the funds of her uncle as a joint depositor, on the understanding that the enjoyment of the fund was to be his, if at all, only on her death, would be a disposition testamentary in character in violation of the statute of wills, and hence invalid.—*Hunt v. Naylor*, N. J. Ch., 95 Atl. 138.